No. 83-751

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

SECURITIES AND EXCHANGE COMMISSION, ET AL.,
PETITIONERS

v.

JERRY T. O'BRIEN, INC., ET. AL.,
RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.

By: William D. Symmes

Thomas D. Cochran

Attorneys for Respondents
Harry F. Magnuson and
H.F. Magnuson & Company
11th Floor, ONB Building
Spokane, Washington 99201
(509) 624-5265

QUESTION PRESENTED

Whether or not respondents herein were entitled to notice of the SEC administrative subpoenas issued to third parties under the specific circumstances of this case.

PARTIES TO THE PROCEEDING

Petitioners (who were defendants and cross-defendants in the district court and appellees in the court of appeals) are the Securities and Exchange Commission and Jack H. Bookey, Lane B. Emory and George N. Prince, employees of the Commission's Seattle Regional Office.

Respondents are Jerry T. O'Brien, Inc., d/b/a Pennaluna & Co.; Jerry T. O'Brien; Benjamin A. Harrison; and Pennaluna & Co., Inc. (all of whom were plaintiffs in the district court and appellants in the court of appeals) and Harry F. Magnuson (hereinafter called "Magnuson" and H.F. Magnuson & Co. (hereinafter called "HFM & Co") (who were defendants and cross-plaintiffs in the district court and appellants in the court of appeals).

Respondent Magnuson is a certified public accountant who resides in Wallace, Idaho. Respondent HFM & Co is a certified public accounting firm with offices in Wallace, Coeur d'Alene and Kellogg, Idaho. The Wallace office is a sole proprietorship owned by Magnuson and the Kellogg and Coeur d'Alene offices are partnerships among Magnuson and other certified public accountants.

Respondent O'Brien is a resident of Kootenai County, Idaho and is the sole owner of J.T. O'Brien, Inc., d/b/a Pennaluna & Co., a registered broker-dealer. J.T. O'Brien, Inc. is a corporation incorporated under the laws of the State of Idaho and has its principal place of business in Wallace, Idaho. Respondent Harrison is an employee of O'Brien, Inc. and resides in Spokane, Washington. Respondent Pennaluna & Co.,

Inc., is a corporation and is incorporated under the laws of the State of Idaho and has its principal place of business in Spokane, Washington.

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Respondents, Magnuson and HFM & Co, submit the following Brief in Opposition to the Petition for a Writ of Certiorari filed by the SEC seeking review of the opinion of the United States Court of

Appeals for the Ninth Circuit in this case.

I.

OPINIONS BELOW

The opinion of the court of appeals is reported at 704 F.2d 1065. The opinions of the district court are not reported. See Appendix to Petitioners' Brief, pp. 9a-16a, 17a-24a (where the opinions are set forth).

II

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1983. The SEC's petition for rehearing was denied on September 30, 1983. The SEC invokes jurisdiction of this Court under 28 U.S.C. §1254(1).

III.

STATUTORY PROVISIONS INVOLVED

No constitutional provisions are involved in the instant case. The statutory provisions and regulations involved in this case are Section 19(a) of the Securities Act of 1933, 15 U.S.C. §77s(a); Section 19(b) of the Securities Act of 1933, 15 U.S.C. §77s(b); Section 22(b) of the Securities Act of 1933, 15 U.S.C. §77v(b); Section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(a); Section 21(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(b); Section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(c); and 17 CFR §202.5(a).

IV.

STATEMENT OF THE CASE

A. SEC Investigation.

1. Nature of Suit.

This suit concerns the conduct of an investigation by the SEC and particularly its staff attorneys while acting outside the scope and beyond the authority defined in a Formal Order of Investigation (hereinafter called "FOI") styled "In the Matter of H.F. Magnuson & Company." Although the FOI alleges no violation of any securities law to have been committed by HFM & Co., it recites that the investigation was undertaken to ascertain whether Magnuson and certain others had violated various provisions of the Securities Act of 1933, 15 U.S.C. §77(a) et. seq., and the Securities Exchange Act of 1934, 15 U.S.C. §78(a) et. seq., or rules promulgated by the SEC thereunder, in certain specific

transactions involving six (6) mining companies. CR 1, Ex. A. (References are made to the record below.)

2. Issuance of FOI.

The SEC, through its Seattle Regional office, began the subject investigation of Magnuson in 1978. On September 3, 1980, the SEC entered an Order of Formal Investigation, CR 1, Ex. A, which granted limited subpoena power to certain SEC attorneys and staff.

Under the relevant statutes, the SEC is without authority to issue subpoenas as part of its investigation until a FOI is issued by the Commission itself. When a FOI is issued, the Commission then, consistent with the congressional scheme, authorizes named officers of the SEC to use subpoena power to "investigate certain transactions" being the subject of the investigation as framed by the FOI

itself. See Petitioners' Brief, p. 10 n.27.

3. Scope of FOI.

The FOI here is simple and straight forward as to those transactions and matters under investigation. The FOI states there is information which tends to show that Magnuson and named others bought and sold stock of a single named mining company on the basis of nonpublic or inside information. CR 1, Ex. A1 ¶II B.

The FOI also states there is information which tends to show that Magnuson, being directly or indirectly the beneficial owner of more than ten percent of the common stock of four named companies and has made incomplete disclosures and filings concerning his ownership. CR 1, Ex. A1 ¶II C.

The FOI states there is information which tends to show that Magnuson and

others have acquired, directly and indirectly, beneficial ownership of equity securities of four named companies and, as such, have failed to make disclosures and appropriate filings as required under Sections 13(d) and 13(g) of the 1934 Act. CR 1, Ex. A ¶II D.

Finally, the FOI states there is evidence which tends to show that Magnuson and other named persons and certain named corporations have offered to sell and have sold stock in three named companies in violation of the anti-fraud provisions of the Securities Act of 1933. CR 1, Ex. A. ¶II F, G, H.

Even though the FOI is limited, as set forth above, subpoenas have been issued by the SEC seeking documents relating to transactions in the securities of many mining companies other than those six named in the FOI, and the SEC has also issued subpoenas under the guise

of the FOI here seeking to investigate transactions beyond the time frame of the FOI and violations not even alleged in the FOI.

B. SEC Investigation Exceeded Scope of FOI.

Without informing Magnuson, or any of the other respondents herein or any other target of the investigation, that an investigation had been conducted or that the FOI had been issued by the Commission, certain SEC officers proceeded to subpoena various records and documents and take testimony from various witnesses. As of this date the SEC has issued at least sixty subpoenas duces tecum directed to various witnesses. CR 102, Ex. D-X.

Magnuson was not informed nor notified by the SEC of the existence of the investigation which started in 1978 until July 1981, ten months after

issuance of the FOI, when he and HFM & Co. received various subpoenas duces tecum calling for production of a broad category of records. Magnuson and HFM & Co. notified the SEC that he would not voluntarily comply with the subpoenas because the subpoenas duces tecum sought documents not authorized by the FOI and, further, because it became apparent that the SEC was engaged in nothing more than a fishing expedition which had been ongoing for more than three (3) years. In this connection, it is interesting to note that the SEC never asked to talk with HFM or any other target about any matter under investigation and it still has not done so.

The conduct of the investigation by the SEC, its attorneys and staff, as evidenced by the various issued subpoenas, has been made without authority of the FOI and with lack of good faith.

Copies of the FOI, a nonpublic document, were furnished or shown by the SEC to numerous persons including clients of and persons with whom Magnuson and HFM & Co. do business, despite the fact that the investigation was to be conducted on private, nonpublic and confidential basis under the SEC's rules and terms of the FOI itself and despite the fact that no wrongdoing is alleged, in the FOI, to have been committed by HFM & Co.

The SEC leaked the fact that the nonpublic investigation was being conducted and the nature of the investigation by furnishing or allowing review of the nonpublic FOI by others in a manner calculated to injure, defame and cause embarrassment to Magnuson. As a result of these activities by the SEC, a news article appeared in the Kellogg (Idaho) Evening News on July 22, 1981 revealing

that the SEC was investigating Magnuson. CR 1, Ex. K. The news article described the FOI in detail and further went on to discuss the matters under investigation. Petitioner Bookey of the SEC is quoted as saying in the article "We don't comment on an investigation in progress", thus confirming the investigation's existence. Despite the obvious leak of a nonpublic investigation by the SEC, the SEC has refused to disclose the names of the persons to whom the FOI was furnished or shown or to furnish Magnuson the results of its investigation of the leak. Similar articles also appeared in the Spokane, Washington newspapers on July 23, 1981.

On September 4, 1981, George N. Prince, an attorney for the SEC, without permission examined certain personal records of respondent Harrison without the knowledge or consent of Harrison.

In conducting the investigation, the SEC issued several subpoenas to respondent O'Brien. O'Brien was not named in the FOI as being under investigation, i.e., a "target," and thus voluntarily complied with the subpoenas after his counsel had been informed by the SEC that O'Brien was not a target of the investigation. CR 2. In May of 1981, the SEC conducted an audit of O'Brien's records under the guise of the FOI in question lasting a total of four days and reviewed certain trading account ledgers and other records relating to various mining securities transactions of O'Brien, many not related to the companies nor trading alleged in the FOI to be under investigation. Subsequent to the extensive production by O'Brien to the SEC and the multiple reviews of documents maintained at O'Brien, Inc.'s office by Prince and other SEC personnel, counsel for O'Brien

was belatedly informed by the SEC in August 1981, after having complied with a half dozen subpoenas over six months, that in fact O'Brien was a target of the investigation. CR 2.

Illustrative of the SEC's invalid expansion of the use of subpoenas to acquire records and information beyond the scope of the FOI are some of the third party subpoenas issued. CR 102, Ex. D-X. For example, the SEC sought and acquired from O'Brien, Inc. documents concerning securities transactions occurring many months or years after the date of the FOI. CR 102, Ex. D. It further sought and acquired documents relating to transactions in a vast number of companies beyond the limited transactions of the six companies under investigation. CR 102, Ex. D. See also, CR 102, Exs. E-X. Virtually all of the third party subpoenas issued by the SEC

required production of documents unrelated either in time or scope to the FOI.

A telling admission of the broad invalid expansion of the FOI is the SEC's current investigation of transactions of shares in four mining companies which were the target of a takeover bid by Sunshine Mining Company. CR 102, Exs. U-X. The takeover attempt did not even commence until six months after the date of the FOI. Moreover, the SEC has sought and obtained documents concerning transactions in companies unrelated to the FOI which transactions occurred months if not years after the period of time under investigation. See, e.g., CR 102, Ex. E-X.

C. Litigation in District Court.

The action below was initiated on September 9, 1981, by O'Brien, Benjamin

A. Harrison ("Harrison") and Pennaluna & Company, Inc. ("Pennaluna"), as plaintiffs, against the SEC, Magnuson, and HFM & Co as defendants in the United States District Court for the Eastern District of Washington. CR 1. By the suit, the plaintiffs sought legal relief by way of damages and also sought to enjoin the SEC from violation of plaintiffs' statutory rights, i.e., from issuing subpoenas to investigate events and persons outside of the scope of the FOI issued by the Commission; and from acting in bad faith in the conduct of the investigation.

The O'Brien respondents have additionally sought to enjoin HFM & Co from production of certain of O'Brien's documents in its possession as accountant for O'Brien pursuant to an SEC subpoena served upon HFM & Co for production of such documents. CR 1.

Thereafter, on September 25, 1981, CR 26, the Magnuson respondents filed a cross claim and third party complaint against the SEC and a third party complaint against three employees of the SEC, seeking equitable and legal relief against the SEC and its employees. Magnuson similarly sought to restrain the SEC from acting beyond the scope of its statutory authority by investigating matters and issuing process and subpoenas beyond the scope of the FOI and, thus, without authority.

Subsequently, the SEC moved to dismiss the claims of all respondents. CR 43. Following a hearing, the district court entered its opinion and order dated January 20, 1982, CR 61, granting the SEC's motion to dismiss the equitable claims of the respondents, but denying its motion to dismiss their respective legal claims.

The district court reasoned that because there were outstanding SEC subpoenas to respondents O'Brien and Magnuson, the respondents would have the opportunity to object to the excessively broad and otherwise unauthorized subpoenas issued by SEC staff attorneys at a subpoena enforcement hearing which would presumably be brought promptly by the SEC pursuant to Section 22(b) of the Securities Act of 1933, 15 U.S.C. 77v(b), and Section 21(c) of the Exchange Act of 1934, 15 U.S.C. 78u(c). Thus, the district court concluded that the respondents Magnuson and O'Brien would have an adequate remedy at law at such a hearing.

However, the SEC brought no subpoena enforcement action against respondents O'Brien or Magnuson. Instead it continued after the January 20, 1982, order to issue an untold number of administrative subpoenas to third persons and, in

so doing, side-stepped the need to bring a subpoena enforcement action against respondents and, thus, thwarted respondents so-called "adequate remedy at law." Indeed, the district court noted at a subsequent hearing on March 25, 1982, that the SEC had "waged an aggressive investigation, issuing numerous subpoenas" to third parties since the last hearing on January 20, 1982. CR 104. In this connection, it should be noted that Magnuson alleged in district court and argued to the Ninth Circuit, and the SEC did not deny, that the SEC was issuing many third party subpoenas and subpoenas duces tecum not only beyond the scope of their awareness but beyond the scope of the FOI.

Consequently, Magnuson and O'Brien urged the district court to require the SEC to give respondents notice of third party subpoenas so that the SEC could not

"end-run" a subpoena enforcement hearing and so that respondents could protect their rights in the absence of such a hearing. CR 68.

On March 25, 1982, the district court declined to order notice. CR 104. But in so doing, the court stated:

> "The natural query at this junction is what protections exist for the ostensible 'target' of an investigation if he is not aware of process outstanding against third parties. Plaintiffs suggest that the only effective remedy would be to require notice to those under investigation whenever such process is issued. The argument is not without appeal." CR 104.

The district court also expressed concern with its ruling:

> ". . . I cannot say with certainty that this heretofore unresolved question could not be determined otherwise on appeal. The issue is intriguing, eminently arguable, and certainly substantial in the sense that the questions raised should be authoritatively determined on appeal. CR 104.

Consequently, the district court granted a stay of fourteen (14) days

enjoining the SEC from enforcing any outstanding process to enable the question of third party notice to be brought to the immediate attention of the Ninth Circuit. CR 104.

Of concern to the district court and respondents was that, in the case of third party subpoenas, the third party had no incentive either to inform the target of the outstanding subpoena or to challenge its validity in district court. If the subpoenaed third party was a broker and thus regulated by and dependent upon cooperation with the SEC for his livelihood, he cannot safely afford to question the validity of the subpoena or the scope of the information or documents sought thereby. Therefore, it is easily seen how a SEC investigation, relying primarily on third party subpoenas, can evade judicial scrutiny even

when the subpoenas admittedly exceed the scope authorized by the FOI.

A timely appeal was subsequently taken by the Magnuson respondents. CR 105.

D. Decision of Ninth Circuit Court of Appeals.

The Court of Appeals held that the targets of the investigation here were entitled to have the investigation conducted in good faith and in conformity with their legal rights. Faced with the record before it and to assure maintenance of respondents' legal rights, the court reasoned that notice to the targets of the investigation of third party subpoenas was essential in order for the targets to have the opportunity to protect their rights. It concluded that the targets of the SEC investigation should be given notice by the SEC of subpoenas directed to third parties

arising out of its investigation of the respondents here.

The decision of the Court of Appeals is based on this Court's decisions in U.S. v. Powell, 379 U.S. 49 (1964), and Reisman v. Caplin, 375 U.S. 440 (1964), and effectuates the statutory process authored in Sections 19(b), and 22(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), and 77v(b), in Sections 21(b), (c) of the Exchange Act of 1934, U.S.C. 78u(b), 78u(c), as well as the Commission's own regulations issued thereunder.

V.

SUMMARY OF ARGUMENT

The Magnuson respondents do not argue that the SEC lacks the right to investigate potential securities law violations or that the SEC lacked probable cause to issue the FOI. The Magnuson respondents do not object to

legitimate subpoenas to advance an agency instituted investigation. Nor do they complain of administrative depositions of third persons so long as they are conducted within the scope of the FOI.

On the other hand, where an agency is conducting an ongoing investigation, aspects of which are beyond the scope of FOI and therefore are without Congressional authority, and where the agency obtained information and documents through subpoenas to third parties without the opportunity for judicial review at an enforcement hearing, the Magnuson respondents sought notice of third party process so that they could address unauthorized agency conduct in the appropriate forum.

The Magnuson respondents do not seek an order of the court that they had the right to be free from investigation by the SEC. Nor do they seek an order

detailing who the SEC can investigate, how they can investigate, nor when or why the SEC can investigate them. What the Magnuson respondents sought, however, was that they were being investigated consistent with statutory authority and agency good faith.

The sole question presented to this Court is thus whether or not a target of a SEC investigation should be given notice of administrative subpoenas issued to third parties.

The holding of the Ninth Circuit in this case answered the posed question affirmatively. The ruling is consistent with congressional authority and prior case law of this Court.

As for Congress, it limited use of subpoena power by the SEC. It legislated that subpoena authority is limited to the scope and extent of the FOI issued by the Commission. Subpoenas may only be used

to compel testimony and production of records for those certain transactions under investigation as defined by the FOI. 15 U.S.C. §77s(b), 78u(b). Many of the subpoenas issued in this case by agency staff went well beyond the FOI and thus have exceeded Congressional mandate.

This Court has often stated that members of the public have a right to be investigated by federal agencies only within their respective authority. Moreover this Court has stated that targets of agency investigation may have certain remedies in the event of abusive process issued to third parties and may attack the same on appropriate grounds. Reisman v. Caplin, 375 U.S. 440 (1964). This Court has also held that members of the public have a right not to have agency process in an investigation used otherwise than in good faith. United States v. Powell, 379 U.S. 48 (1964).

The decision of the Court of Appeals is based on statute and upon the foregoing decisions of this Court. It creates no new rights or remedies. Rather it merely provides a mechanism whereby the target of an SEC investigation will be provided notice of third party process so that he may apply to the appropriate forum for whatever relief he may be entitled.

By providing a mechanism of knowledge, the Court of Appeals does not burden agency investigations nor question the investigations' legitimacy. The notice requirement merely affords targets an opportunity to question the process on any appropriate grounds. Reisman v. Caplin, supra. Therefore, the petition for a writ of certiorari should be denied.

VI.

ARGUMENT - WHY PETITION SHOULD BE DENIED

A. The Holding of the Ninth Circuit is Consistent with Announced Congressional Intent and Prior Supreme Court Case Law.

Congress has granted the SEC "limited authority" to undertake investigations. United States v. Sells Engineering, Inc., ___ U.S. ____, 77 L. Ed.2d 743 (1983). The SEC may exercise its authority only in compliance with statutory standards and judicial decisions. United States v. Powell, supra.

In this connection, Congress has given the SEC authorization to issue agency subpoenas to further its investigatory function. However, an SEC administrative subpoena may be issued only as authorized by law. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). Since Congress withheld from the

SEC the authority to enforce its own subpoenas, the SEC must seek judicial enforcement.

The courts will not enforce SEC subpoenas without a showing by the agency that it is seeking information in documents within statutory limits. This Court stated in Powell:

> "Reading the statute as we do . . . [the agency] must show (1) that the investigation will be conducted pursuant to a legitimate purpose, (2) that the inquiry may be relevant to the purpose, . . . (4) that the administrative steps required . . . have been followed." 379 U.S. at 57-58.

One of the requirements that the agency must follow is to limit the investigation to those matters and transactions identified in the FOI. Congress has specifically announced that the power of the SEC to issue subpoenas under a FOI is limited as follows:

> Subpoenas are enforceable only to the extent that they seek

> information which is reasonably relevant to matters within the scope of the Formal Order of Investigation. Should the staff uncover information indicating the advisability of pursuing possible violations not embodied within the scope of the Formal Order, it must be returned to the Commission and seek an amendment to the order. [H.R. Rep. No. 1321, 96th Cong., 2d Sess. 2 (1980) reprinted in [1980] U.S. Code Cong. & Admin. News 3877 n.2 (Emphasis added).]

In fact, the SEC admits the same in its petition stating "Commission attorneys may not issue subpoenas until the Commissioner's five presidentially-appointed members first determine that subpoena power should be authorized to investigate certain transactions (17 CFR 202.5)." Petitioner's Brief, p. 10, n. 27. (Emphasis added.)

Thus, Congress, having addressed the issue of the scope of SEC subpoena power, has created and defined rights in members of the public as to the manner by which the SEC may investigate them by the use of subpoenas.

This Court has often held that the federal courts have the power to prevent the deprivation of a congressionally granted right. See, e.g., Leedom v. Kyne, 358 U.S. 184 (1958). In Leedom v. Kyne, supra, it is noted "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." Id. at 190.

This Court has often held that members of the public have a right that federal agency subpoenas must be issued in good faith and not in abuse of their statutory authority. United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978).

Agency process is not self-executing. Rather enforcement, by statute, is left to the federal courts. The reason is clear:

> [The SEC] is not an historic guardian of individual liberties. Instead, its two functions are investigation of possible illegal

activities, and adjudication of alleged violations. SEC v. ESM Government Securities, Inc., 645 F.2d 310, 312-313 (5th Cir. 1981).

The recipients of and those affected by agency subpoenas, i.e., the targets of an agency investigation, may seek redress against agency process on any appropriate ground Reisman v. Caplin, 375 U.S. 440 (1964). This Court has never provided a complete list of the appropriate grounds for challenge. However, this Court has held that an appropriate ground is where process is issued contrary to and beyond statutory authority and in lack of good faith thus showing agency abuse of process. United States v. Powell, 379 U.S 48 (1964); United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978).

From time to time, this Court has given examples of elements of a good-faith exercise of agency subpoena power. In United States v. Powell, 379 U.S. 48 (1964), this Court listed certain

elements of a good-faith exercise of issuances of subpoenas as quoted above.

The Magnuson respondents made a showing before the courts below that certain subpoenas had been issued by the SEC to third parties seeking documents and information beyond the scope of the FOI and, as such, have exceeded the SEC's statutory authority in violation of the Magnuson respondents' rights. In fact, the district court judge below noted that, "the SEC has waged an aggressive investigation, issuing numerous subpoenas in the Spokane area to various mining companies and brokers. Plaintiffs contend that the subject matter sought under these subpoenas is in substance the same as that sought under the subpoenas issued directly to the parties in this action. It is argued that the SEC is attempting an 'end run' around the procedural safeguards set forth in

Powell." Order of March 25, 1983. Appendix to Petition, p. 10a.

In the usual case, the recipient of an administrative subpoena may not bring an independent action seeking to quash the subpoena or test the legality of the underlying investigation, and can only make such a motion in response to a subpoena enforcement brought by the agency issuing the subpoena. See, e.g., Reisman v. Caplin, 375 U.S. 440 (1964). Similarly, there are many circumstances in which those subjected to an agency investigation must await final agency action before challenging the conduct of the investigation or other agency proceedings. See, e.g., SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118 (3d Cir. 1981). The rationale in such instances, is that normally the private party has an adequate remedy of law to challenge the action in a subsequent

subpoena enforcement proceedings or in an appeal from a final agency decision. This is clearly not the case here in the instance of third party process.

Courts have consistently recognized that equitable relief is required where an agency exercises its authority in excess of its statutory authority. Coca-Cola Company v. FTC, 475 F.2d 299 (5th Cir. 1973); Leedom v. Kyne, 358 U.S. 184 (1958).

In the case of a third party subpoena, how can the investigated person's rights be protected if he or she has no notice of the third party subpoena?

If third party agency subpoenas were being issued unknown to Magnuson and the third party voluntarily complied with the same, no ability to guarantee or enforce Magnuson's rights exists in the absence of knowledge of the process. Magnuson has no ability to challenge the excesses

of an outstanding subpoena directed to others concerning unrelated activities occurring in a time frame postdating the FOI in the absence of knowledge.

This Court has never furnished a complete listing of situations demonstrating agency abuse of process. United States v. LaSalle Nat'l Bank, supra. This Court has noted that "[f]uture cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." Id. at 318 n.20.

In the instant case, the Court of Appeals did not involve itself in agency investigations. The Court set forth no ruling affecting who, what, why, when or how members of the public may be investigated by the SEC. The Ninth Circuit created no new rights in the Magnuson respondents. Rather, its decision provided merely a mechanism for targets

of an investigation to be given notice of third party subpoenas. By stating that notice of third party process should be given to targets of an SEC investigation, the Ninth Circuit provided a mechanism whereby notified targets can thereafter seek redress of any rights and remedies they already have in an appropriate forum.

This mechanism implements what the Supreme Court and Congress have already established; namely, the right of a target to seek judicial review of agency subpoenas. Having the potential right to attack abuses and lack of good faith, the Court of Appeals merely ensured that the rights would not vanish through lack of knowledge. In the absence of notice, this right becomes meaningless. This case involves agency compliance with the law as it already exists. The decision of the Ninth Circuit was inevitable. The

result of the notice requirement in public confidence in knowing that the agency is following its statutory authority. Notwithstanding the SEC's argument to the contrary, in a case such as this where the targets are clearly identified, there can be no harm to the agency or any undue burden to an agency investigation by the mere fact of giving the target notice of third party process.

B. The Ninth Circuit Decision Does Not Present Conflicts with Decisions of Other Circuit Courts, But Rather is Consistent with the Same.

The decision by the Ninth Circuit below does not conflict with decisions of other circuit courts of appeal, but is consistent with the same. Any seeming differences in such cases can be fairly accounted for on the basis of important factual variations from those involved here.

The SEC argues that the decision in In re Cole, 342 F.2d 5 (2d Cir. 1965) is in conflict with the decision here. However, no conflict exists. In re Cole, a taxpayer target sought notice of an IRS summons to a known third party, the taxpayer's bank. Because the third party was known, the target was able to force the IRS to initiate a subpoena enforcement action. At the subpoena enforcement action, the court held since the taxpayer did not own the books or records belonging to the third party being subpoenaed that he had no standing to object to the summons. The decision was limited to the factual circumstances before it. Moreover, the decision in In re Cole has been statutorily changed by the enactment of the Right to Financial Privacy Act of 1978, 12 U.S.C. §3401 et seq under which the SEC must give notice to targets of subpoenas of financial institution

account records of the target's transactions. Therefore Cole has no longer any validity.

The Commission also cites the case of Scarafiotti v. Shea, 456 F.2d 1052 (10th Cir. 1972) as being in conflict with the decision of the Ninth Circuit. However, no conflict exists. In Scarafiotti, the target taxpayer requested notice of any interview of any third party. This is not the thrust in this case where notice is only sought of subpoenas issued to unknown third parties under the guise of statutory authority. Moreover, in Scarafiotti, the taxpayer sought mandamus to issue compelling notice. There, the court felt that mandamus could not issue based upon the facts of that case. Moreover, the respondents therein did not assert as here the abusive nature of the agency process. Additionally, Congress has,

after the decision in Scarafiotti, provided for notice of IRS summonses issued to third parties. Therefore, the cases has no further precedential value.

The Commission is correct when it cites that Donaldson v. United States, 400 U.S. 517 (1971), did not require notice. The court in Donaldson never addressed the issue. The court in Donaldson, as it was concerned in Reisman v. Caplin, 375 U.S. 440 (1964), was concerned with the good faith of agency actions. The court there was only concerned with the rights that one had when being investigated and left it to other cases in appropriate factual settings to develop how to effectuate the rights to be investigated consistent with agency statutory authority and in good faith.

The reliance of the Commission on PepsiCo., Inc. v. SEC, 563 F. Supp. 828

(S.D. N.Y. 1983) as showing a conflict in the circuit is misplaced. Not only does that involve a district court ruling and not a decision of the Court of Appeals of the Second Circuit, but moreover, the facts upon which it was based are quite different. There, unlike here, the plaintiff had apparently been served with a subpoena but was not challenging the scope of the subpoena or the purpose of the investigation. Additionally, the plaintiff sought a restraining order barring the Commission from issuing third party subpoenas without first giving notice. Unlike here, there had not been a showing of the SEC overstepping its statutory bounds or abuses in the conduct of the investigation.

C. The "Parade of Horribles" Raised by the SEC amounts to mere Agency Convenience and should not form the Basis for Granting Certiorari in this Case.

By requiring notice the Court of Appeals merely insured compliance with Sections 19(b), and 22(b) of the Securities Act and Section 21(b) and 21(c) of the Exchange Act, and followed the lead taken in Powell and Reisman. If no notice is given to targets, the SEC evades the congressionally-mandated safeguards for prevention of agency abuse through judicial review of subpoenas at an enforcement hearing.

Nevertheless, the SEC raises a "parade of horribles" listing far-fetched ways by which targets with notice could obstruct agency investigations. Such speculation is insufficient in the absence of proof.

At the same time the SEC overlooks that the Ninth Circuit decision does not involve the Court in the general supervision of agency investigations. The decision does not involve who or what or when or why persons may be investigated. The decision is strictly limited to disclosing third party process. Such disclosure does not divulge confidential witness statements nor documents. As stated above, the decision below creates no new rights or remedies.

The SEC's petition makes much ado about the impact that giving notice of third party subpoenas will have on its investigation. Boiled down to simplistic terms, the SEC, for mere "agency convenience," does not want to give notice.

The Commission specifically argues that the decision of the Ninth Circuit "has seriously disrupted the Commission's law enforcement investigations,"

Petition, p. 12; that "the decision below is almost certain to impair the operation of these programs, as well as the SEC's efforts to discharge the statutory mandate" Id.; that notice will "substantially increase the opportunities for the destruction of documents, intimidation of witnesses, tailoring of testimony, fabrication of defenses, and the transfer or dissipation of assets," and "In some cases, targets may threaten witnesses with physical or economic retaliations," and also delay investigations." Id. at p. 14. All as a result, "the Commission and other law enforcement agencies 'would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable.'" Id. at p. 15.

The SEC's "parade of horribles" is nothing novel. The same litany was urged

by the Chairman of the Securities and Exchange Commission before Congress in an unsuccessful attempt to exempt the SEC from the disclosure provisions of the Right to Financial Privacy Act of 1978, 12 USC §3401 et seq. See H.R. Rep. N. 1321, 96th Cong., 2d Sess. 2 (1980) represented in [1980] U.S. Code Cong. & Admin., News 3886-3889.

Thus, Congress has already considered the SEC's parade of horribles and on balance Congress concluded that notice to customers of financial institutions of agency subpoenas outweighs the claims of the Commission.

Also, in an investigation where a target accidentally learns of the third party process by some other means, the parade of horribles is no less present.

Moreover, there has never been any contention in this case that any of the

parade of horribles has or is likely to happen.

Apparently not liking what Congress and the Supreme Court have previously concluded as to the nature of a target's rights, all that the SEC is really saying is "let's not make it easy for investigated persons to attempt to effectuate their rights and potential remedies, therefore let's not tell them." Thus, the SEC's action does not involve anything other than administrative convenience and a disregard of the rights previously conferred on the public by Congress and this Court has said exist.

In this case, the SEC has never disputed that it is seeking to investigate matters other than those in the FOI by use of subpoenas issued under the guise of the FOI. Congress has stated it cannot do so without seeking an amendment to the FOI which the SEC has failed to

do. It is up to the federal courts to fashion the appropriate mechanisms to ensure that a person's rights will not be abused. To effectively control abuse of process by the SEC, the target of the investigation must be able to knowingly exercise his rights.

Therefore, denying the target notice of agency process issued to third parties when faced with the showing made by respondents to the courts below of the breach of statutory authority by the SEC in conducting the investigation in this instance, necessarily denies the targets of the ability to assert their rights to be investigated consistent with the good faith standards set forth by this Court in United States v. Powell, 379 U.S. (1964). The court below thus correctly concluded that notice should be given.

The SEC contends that no disclosure should be made because they allege that

their actions are presumed to be valid. However, the presumed validity of an agency investigation comes into play only when one is in the appropriate forum trying to test the legitimacy of agency process under the Powell standards. There, as the Magnuson respondents recognize, the person opposing the process has a heavy burden of proving abusive process. However, one has no opportunity to test the legitimacy of process in the absence of knowledge of the same. In the absence of notice members of the public have no ability to test agency good faith and to insure that the agency is operating within its statutory framework. Disclosure to targets of third party process does not stop investigations. In fact, the investigation in this case has not been

stopped ever until this date. But without notice, the public's rights to have an investigation properly conducted are negated. This Court and Congress has already established how agency investigations are to be conducted. The Ninth Circuit did not add or detract from this reasoning. It created no new rights nor remedies. It only provided a mechanism whereby a target or member of the public will not lose a potential right or remedy in force of lack of knowledge.

VII.

RELIEF REQUESTED

The petition for certiorari should be denied.

DATED: December 7, 1983

Respectfully submitted,

WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.

BY S/ WDS
WILLIAM D. SYMMES

BY S/ TDC
THOMAS D. COCHRAN

Attorneys for Respondents
Harry F. Magnuson and
H.F. Magnuson & Company
11th Floor, ONB Building
Spokane, Washington 99201
(509) 624-5265